

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NOs.

| | | |
|----------------------------------|--------------|------------------|
| David Ames | Employee | 050150-01 |
| George Caldwell | Employee | 057494-98 |
| Edward Desreuisseau | Employee | 057601-98 |
| Dennis Fratus | Employee | 057578-98 |
| Allan Gagnon | Employee | 057493-98 |
| Thomas Nugent | Employee | 057581-98 |
| Richard Peers | Employee | 057489-98 |
| James Puglisi | Employee | 057511-98 |
| Barry Towns | Employee | 057599-98 |
| Dale Webber | Employee | 057584-98 |
| Town of Plymouth | Employer | |
| MIIA Workers' Compensation Group | Self-insurer | |

REVIEWING BOARD DECISION

(Judges McCarthy, Horan and Fabricant)

APPEARANCES

Richard N. Curtin, Esq., for the employees
Donald E. Wallace, Esq., for the self-insurer
David DeLuca, Esq., for the employer

McCARTHY, J. In this appeal, the employees challenge an administrative judge's decision finding they failed to meet their burden of proving that any of them suffered a "personal injury" under G. L. c. 152, §26, following exposure to asbestos. For the following reasons, we affirm the judge's decision, and, like the judge, leave it open to the employees to bring new claims should their exposure eventually result in injuries.

The claimants are ten employees of the maintenance, highway and cemetery departments of the Town of Plymouth, who were assigned to perform various jobs involving the demolition and removal of debris from the Lout Pond water pumping

facility on February 11 and 12, 1998.¹ The atmosphere in the main area of work, the boiler room, became very dusty, and the employees' skin, hair and clothes became coated with a grayish-white dust. Due to concern that some of the material was hazardous,² on February 20, 1998, a representative of the Massachusetts Division of Occupational Safety collected samples from the boiler room and from inside and outside the dumpster at the Lout Pond facility. The samples were found to contain well above the allowable levels of asbestos fibers.³ The employees were not aware that they were working with asbestos, nor had they been given any instruction in handling asbestos-containing material, or provided with any masks, respirators, or ventilation support. (Dec. 9-13.)

Since the discovery of asbestos in the debris, the employer has paid for each employee to be screened annually at Jordan Hospital for lung and respiratory problems.⁴ No doctor has yet advised any of the employees to undergo testing or treatment beyond these screenings. (Dec. 13.)

The employees filed claims in 2002 alleging personal injuries as a result of the serious and willful misconduct of the employer. See G. L. c. 152, § 28. The parties agreed to have all ten claims heard together since they arose out of a common situation. Following a § 10A conference, an administrative judge denied the claims, and the employees appealed. The case was bifurcated at hearing, with the § 28 claims deferred pending determination of whether the claimants had suffered personal injuries. (Dec. 4.)

Because liability had not been established, the parties agreed that no impartial examination was required. See 452 Code Mass. Regs. § 1.10(7). The employees offered

¹ Other employees who are not parties to this proceeding also participated in the work at Lout Pond. (Dec. 8-11 & nn.2 & 4.)

² On February 12, 1998, a hazardous materials crew removed mercury which had been discovered at the site. (Dec. 12.)

³ The samples contained 75% chrysotile asbestos; safety regulations allow 1%. (Dec. 13.)

⁴ The insurer states that these medical screenings have been done pursuant to an arbitration decision issued following a union grievance. (Ins. br. 4-5.)

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the medical report and deposition testimony of Dr. Mark Friedman. The insurer submitted the reports and deposition testimony of Dr. Thomas Morris, who examined all ten claimants. (Dec. 5.)

Both doctors agreed it was possible that some individuals exposed to asbestos could develop symptoms of asbestosis, pulmonary fibrosis or other asbestos-related diseases after a latency period of approximately twenty years. However, neither doctor could state with any degree of medical certainty that any of the ten claimants would develop any medical problem resulting from the alleged exposure. Both agreed, however, that long-term medical surveillance of the employees would be appropriate. (Dec. 14-15.)

Dr. Friedman opined that none of the employees showed any evidence of a medical condition causally related to the asbestos exposure of February 1998. (Dec. 14.) Dr. Morris opined that it would be unusual to have evidence of pleural disease in the form of pleural thickening five years after exposure, and that it would require a biopsy to document the inhalation or ingestion of asbestos fibers. (Dec. 15.) Dr. Morris further opined that acute asbestosis, in the form of an inflammatory process in the lungs, can occur within six weeks, usually after a massive exposure to clouds of asbestos dust, but that the claimants had no symptoms of this. (Dec. 15; Morris dep. 16-18, 32.) He further testified that exposure over a period of weeks or months, rather than an acute single episode of exposure, generally produces pleural disease in the form of pleural plaques, and/or interstitial pneumonitis in the form of asbestosis, or cancer of the pleura known as mesothelioma. The latency period for asbestosis resulting from non-acute exposure is approximately twenty years. (Dec. 15; Morris dep. 16.) Even when presented with a scenario of “ ‘intense exposure over one to three days[] . . . full days and clouds of visible dust,’ ” (Dec 15, quoting Morris dep. 61), a scenario which the judge found did not exist at Lout Pond on the days in question, Dr. Morris opined only that it is “*possible* that twenty years hence, one *could* develop signs and symptoms of [asbestosis, pulmonary fibrosis, what have you.]” (Dec. 16, quoting Morris dep. 62.) (Emphasis in original.)

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Even assuming those levels of exposure, Dr. Morris could not predict what would happen to any of the ten individuals exposed. (Dec. 16; Morris dep. 74.) Dr. Morris concluded:

I can't tell who is going to develop problems in this population. Were they exposed, probably. May they have some microscopic injury, possibly. Will they get into trouble later on, I can't tell you.

(Morris dep. 75; see Dec. 16.) The judge adopted Dr. Morris's opinion. (Dec. 16.)

The judge found that none of the employees had complained of any respiratory problems during the demolition, or sought medical treatment, or lost time from work, or suffered any physical restrictions as a result of the claimed exposure. (Dec. 8.) He further found that each employee was "exposed . . . to air-borne asbestos fiber . . . but there is no evidence that he ingested such material, nor that he has sustained any personal injury as a result of the exposure." (Dec. 19-29.) The judge concluded:

Each of the employees has failed to meet his burden of proof that he sustained a personal injury as contemplated by Chapter 152, because none of them has demonstrated that he has suffered ["a lesion or change"] which has produced ["harm or pain or a lessened facility of the natural use of any bodily activity or capability." Burns's Case, 218 Mass. 8, 12 (1914).

The opinion of both Dr. Friedman and Dr. Morris does not support a finding to a reasonable degree of medical certainty, beyond that of mere possibility, that any of these employees has sustained a personal injury, or will ever sustain a personal injury arising out of the events of February 11 and 12, 1998 while at Lout Pond.

The testimony of each of the employees does not support a finding that they have suffered any incapacity in their ability to earn wages as a result of the exposure at Lout Pond.

Because exposure to asbestos-containing materials may result in harm in the employees some years after the exposure, I leave open the right of each employee noted above, to file a claim for compensation under this chapter when it is determined that the employee knows or should know of a specific harmful [sic] which has resulted from the exposure to asbestos at the Lout Pond facility in February, 1998.

(Dec. 29.) Accordingly, the judge denied and dismissed the claims. (Dec. 30.)

The employees allege that the judge erred in finding that they did not suffer personal injuries cognizable under Chapter 152. We find no error in the judge's reasoning or decision, but because we have not been presented with this precise issue before, we address each of the employee's arguments in turn. Though the term "personal injury" is not comprehensively defined in G. L. c. 152, § 1(7A), the courts and this board have broadly defined it to include "whatever lesion or change in any part of the system produces harm or pain or a lessened facility of the natural use of any bodily activity or capability." Burns's Case, *supra*; see also Fitzgibbons's Case, 374 Mass. 633, 637 (1978); Tower v. Mass. Hwy Dep't., 17 Mass. Workers' Comp. Rep. 368, 371 (2003). The claimants agree that this definition is controlling, but find fault with the judge's application of it to the facts of their situation. Specifically, they contend that there are two alternative markers of an injury and the judge erred by making them prove both. They assert a need to prove only a "lesion or change in any part of the system [which] produces harm or change," and not a "lessened facility of the natural use of any bodily activity or capability." They contend that they need not prove either incapacity or "a demonstrable consequence," to show they have suffered a "de minimus injury." (Employees br. 25.)

The claimants are correct that an injury may occur without any resulting incapacity. Crowley's Case, 287 Mass. 367, 373-375 (1934); Steuterman's Case, 323 Mass. 454, 457 (1948). However, with or without incapacity, the employee must prove a consequence in the form of a lesion or change. The judge clearly acknowledged this:

The employees argue that there is no requirement that they show they have been incapacitated in order to establish a personal injury under chapter 152 and to be entitled to weekly benefits [at a later time.] There is no disagreement with the argument except to the extent that the condition precedent is the *finding of an injury*, which is lacking in the instant claims.

The employee's [sic] argument that personal injuries are not limited to "compensable injuries" because an employee may receive an "injury" which does not become compensable because it does not incapacitate him or her for seven days from earning full wages also has merit, and is not disputed. There must, however, be an identifiable lesion or change in some body part or function.

(Dec. 17.)(Citations omitted.)(Alteration in original.)

Based on the medical evidence, the judge found no evidence of such lesion or change producing any symptoms *or* incapacity, and thus no personal injury. (Dec. 17). Dr. Morris opined that it would be highly unusual to have evidence of pleural disease in the form of pleural thickening, five years after exposure, and that “other than periodic radiographic and pulmonary screenings, the only way to determine the presence of a lesion would be through a biopsy,” which would not be in the employees’ best interest to perform because of attendant risks. (Dec. 18.) In his deposition testimony, Dr. Morris opined with respect to each employee that there was no evidence of lung disease which was related to asbestos exposure in February 1998. (Morris dep. 86-87, 90, 97, 105, 116, 126-127, 135-136, 149-150, 158, 167.) The employees cite to Crowley’s Case, *supra* for the proposition that a de minimus injury is nonetheless a personal injury. The Crowley decision merely reiterates the definition of personal injury set forth in Burns’s Case, *supra*, and highlights the fact that symptoms may be enough to support a finding that a personal injury occurred, even in the absence of any incapacity to work. Crowley’s Case, *supra* at 373-375. Here, there were no symptoms and no identifiable lesion.⁵

The claimants also argue that, crucial to the judge’s finding of no personal injury, is his erroneous finding that there was no *evidence* that they ingested (inhaled) the asbestos fibers. They claim the judge should have inferred that the employees ingested asbestos fibers, given his finding of exposure and given the impracticability, even impossibility, of proving inhalation at the time of hearing. We do not believe the challenged finding is either erroneous or crucial. First, the judge was absolutely correct that there was no *evidence* of ingestion. Dr. Morris testified:

⁵ We disagree with the employees’ contention that, by addressing the issue of incapacity, (see Dec. 29), the judge improperly required the employees to prove incapacity as a prerequisite to proving they suffered a personal injury, or that the judge erred by citing the definition of personal injury in Black’s Law Dictionary. (See Dec. 16.) It is clear that the judge’s decision to deny the employees’ claims rests on his finding that none of them suffered a lesion or change as described in Burns’s Case, *supra*. Though the evidence also supports a finding that none of them suffered any incapacity, that finding is not necessary to the outcome of the case.

Q: Being present with asbestos materials, is there any way to determine objectively, again, assuming a sampling of ten individuals in a room with some asbestos present, which of those individuals would actually inhale or ingest asbestos fibers?

A: No.

Q: Is there any way to document the mere inhalation or ingestion of asbestos fibers objectively without pathology?

A: No.

(Morris dep. 26.) The judge found that the employees were not in the presence of “massive” clouds of asbestos dust, and that none of them suffered any immediate symptoms from exposure. It was entirely reasonable for him to conclude that there was no evidence of ingestion, despite his finding of exposure to asbestos.

The judge properly left it open to each employee to prove, via a new claim, that he had suffered an injury. Thus, when any employee has *evidence* of ingestion in the form of symptoms or test results revealing asbestos-related disease, he will not be barred from bringing a further claim.⁶

Finally, the claimants maintain a fair reading of the record supports the conclusion that the employees suffered a lesion or change, despite Dr. Morris’s opinion that the claimants “ ‘may have some microscopic injury, *possibly*.’ ” (Dec. 16, quoting Morris dep. 75.) (Emphasis added.) The claimants maintain the fact Dr. Morris stated his opinion in terms of possibility rather than probability does not fatally flaw their claim.

⁶ Clearly, as the judge points out, § 35C contemplates that an injury may manifest itself years after an employee has been exposed to a toxic substance such as asbestos. (Dec. 17.) See, e.g., Letteney’s Case, 429 Mass. 280, 282 (1999). The date of injury then becomes the last date of exposure for purposes of calculating average weekly wage. McDonough’s Case, 440 Mass. 603, 605 (2004), citing Squillante’s Case, 389 Mass. 396, 397 (1983). That does not mean, however, that an employee could have proven an injury at the time of exposure or even a few years thereafter since, by definition, a latent injury is not detectable until many years after exposure. See, e.g., Phillips’s Case, 41 Mass. App. Ct. 617 (1996)(employee last exposed to beryllium in 1942, diagnosed with beryllium-related lung disease in 1973, and awarded weekly compensation benefits beginning in 1984).

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(Employees br. 34, citing Bedugnis v. Paul McGuire Chevrolet, 9 Mass. Workers' Comp. Rep. 801, 803 (1995)). The judge did not interpret the record this way, nor do we see how he could have. The claimants even seem to acknowledge that an injury is no more than a possibility, where they argue that they "have essentially been put on notice by their employer, and several medical and environmental experts that they may have, at some point, physiological issues related to this asbestos exposure." (Employees br. 31.) In addition to opining as to the possibility of a microscopic injury five years after exposure, Dr. Morris opined that it was *possible* that an employee would develop asbestos-related disease twenty years down the line, but less likely with exposure of only a few days (as here) than a few weeks or months. (Morris dep. 62.)⁷ Any inconsistency in Dr. Morris's opinion was slight and was overwhelmed by his overall opinion, as found by the judge.⁸

⁷ Dr. Morris's testimony was:

Given that level of exposure, it is *possible* that 20 years hence, one could develop signs and symptoms of asbestosis, pulmonary fibrosis, what have you. However, given the time course, a period of three or four days with no further insult or injury in the interim, it's *much less likely*. The body has a wonderful tendency to clear itself of a lot of these noxious substances. It's *possible*, but less likely given the time frame of the three days. If it were three months or three years, I'd say it'd be more likely.

(Morris dep. 62.)(Emphasis added.)

At other points in the deposition, his testimony was consistent:

I can say they may well have had exposure to asbestos which *may have started some injurious process*.

(Morris dep. 73.)(Emphasis added.)

Statistically, they *may be likely* to have a microscope, pathological injury and microscopic I use, you can only find with a microscope; and two, it is of so minute in quantity that it's not impairing the patient or causing them any irreparable damage to their pulmonary system in general.

(Morris dep. 81-82.)(Emphasis added.)

⁸ In support of their position, the claimants cite Dr. Morris's testimony below:

A: It is certainly possible that the lung in those individuals would have been injured.

The employees are concerned, however, that because medical-only claims are subject to the statute of limitations in § 41, an affirmance of the judge's decision would bar them from filing a claim beyond four years from their exposure.⁹ See Orekoya v. Bank of New England Corp., 14 Mass. Workers' Comp. Rep. 29, 32 (2000). However, the judge specifically left open the right of each of these employees to file a claim if changing medical circumstances so warrant in the future. (Dec. 29.) The self-insurer did not appeal that part of the decision. In fact, at oral argument, counsel for the self-insurer agreed the statute of limitations has been satisfied with respect to future claims arising out of the acknowledged exposures.¹⁰

Q: And, in fact, assuming, and I think you testified earlier that in the setting that we're talking about, the exposure setting, the unprotected exposure setting, I think at the end of it, and you can correct me if I'm wrong, you indicated that it would be likely that there might be ferruginous—or likely that there would be ferruginous bodies that would develop. And we talked about, and I think it was your term, that they were injured, correct?

A: Yes.

(Morris dep. 68.)

⁹ G. L. c. 152, § 41, provides, in relevant part:

No proceedings for compensation . . . shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and *unless any claim for compensation* due with respect to such *injury* is filed within four years from the date the employee first became aware of the causal relationship between his *disability* and his employment. . . .

The payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for any benefits due pursuant to this chapter for such injury.

(Emphasis added.)

¹⁰ Had the judge not made this finding, the employees would still not be barred from filing a claim beyond four years from exposure. In Orekoya, *supra*, we held that medical treatment triggers the running of the statute of limitations. The inquiry under § 41 is: “ ‘When did the employee “first [become] aware of the causal relationship between his disability [medical

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Accordingly, we affirm the decision of the administrative judge.
So ordered.

William A. McCarthy
Administrative Law Judge

Filed: **June 7, 2005**

Mark D. Horan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

impairment] and his employment[?]" Orekoya, supra, quoting § 41 (alteration in original). Here, the employees lack even symptoms of harm, have no medical impairment and thus are not entitled to any medical testing designed to diagnose an industrial injury. In addition, § 41, as well as § 30, presupposes an injury, of which there is no evidence here. Thus, the statute of limitations has not begun to run in this case.